Supreme Court, U.S.
FILED
AUG 16 1997
CLERK

No. 96-1482

In The

Supreme Court of the United States

October Term, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SEPARATE BRIEF FOR COTCHETT RESPONDENTS

GERALD MALTZ
Counsel of Record
MILLER, PITT & MCANALLY, P.C.
One South Church Avenue,
Ste. 900
Tucson, AZ 85701
(520) 792-3836

Counsel for Respondents Joseph W. Cotchett, Susan Illston, and Cotchett & Pitre f/k/a Cotchett, Illston & Pitre

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The termination of the case against Cotchett during pretrial proceedings 2

B. Lexecon invokes, and accepts the benefits from, the transferee Court's dispositive motion jurisdiction 4

C. The Cotchett Respondents 5

D. The MDL Transfer to Arizona 7

SUMMARY OF ARGUMENT 8

ARGUMENT 9

A TRANSFEREE COURT'S AUTHORITY TO TERMINATE A CASE BY PRETRIAL DISPOSITIVE MOTION IS UNCONTESTED AND BEYOND CHALLENGE 9

THE CONTENTION THAT THE MERE FILING OF A MOTION TO REFER FOR REMAND DIVESTS THE TRANSFEREE COURT OF AUTHORITY TO DECIDE THEN PENDING DISPOSITIVE PRETRIAL MOTIONS HAS NO BASIS IN LAW AND WOULD UNDERMINE MDL PRACTICE 10

A. Lexecon's contention 10

B. No basis in law or practice 11

C. No claim of substantive error or showing of prejudice 12

D. Estoppel 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Caterpillar, Inc. v. Lewis, 117 S.Ct. 467 (1996)..... 13

Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) 13

In Re ACC/Lincoln, 845 F.Supp. 1377 (D. Ariz. 1993)..... 2

In Re ACC/Lincoln, 884 F.Supp. 1388 (D. Ariz. 1995)..... 3

In Re Denney, 135 F.2d 184 (7th Cir.) *cert. denied sub nom., Denney v. Fort Recovery Banking Co.*, 320 U.S. 474 (1943) 13

In Re Korean Airlines, 829 F.2d at 1172 (D.C. Cir. 1987)..... 9

Matsushita Elec. v. Epstein, 116 S.Ct. 873 (1996) 7

Montana v. U.S., 440 U.S. 147 (1979)..... 13

Officers of Justice v. Civil Serv. Comm., 979 F.2d 721 (9th Cir. 1992)..... 12

Rosen v. Rae, 647 P.2d 640 (Ariz. App. 1982)..... 13

STATUTES AND RULES

28 U.S.C. § 1404(a) 10

28 U.S.C. § 1407(a) 9

28 U.S.C. § 1407(b) 8, 9

28 U.S.C. § 1407(e) 11

28 U.S.C. § 2111.....8, 13

Rule 14(a), JPML 9

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

H. Rep. No. 1130, 90th Cong. 2d Sess., 1968 U.S.C.C.A.N. at 1900 9

OTHER AUTHORITIES

15 Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 3866, n. 10 (2d Ed. 1986)..... 9

Manual for Complex Litigation § 31.132 at 253 (3d Ed. 1995)..... 9

Weigel, *The Judicial Panel on Multi-District Litigation, Transferor Court and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978)..... 9

INTRODUCTION

Petitioners' ("Lexecon") claims against Respondents Joseph W. Cotchett, Susan Illston, and Cotchett, Illston & Pitre ("Cotchett Respondents" or "Cotchett") were all dismissed upon *pretrial* motions. The question accepted for review is whether an MDL transferee court "may transfer the case to itself for *purposes of trial.*" Pet., Question 1; Order 5/19/97 (emphasis supplied). Thus, the question accepted for review does not apply to the Cotchett Respondents. However, the relief requested by Lexecon does. Lexecon not only seeks a retrial in Illinois of the one it lost in Arizona against the Milberg Respondents ("Milberg"), but also to vacate and relitigate in Illinois an Order from which it did not appeal: the summary judgment entered in favor of Cotchett during pretrial proceedings in Arizona. It seeks to vacate all orders, proceedings, and judgments of the transferee Court from August 5, 1994 to December 12, 1995, including the summary judgment of April 24, 1995, and to re-commence and re-litigate all of those matters in the District of Illinois.

Cotchett's Motion for Summary Judgment was made eight months *before* Lexecon first moved to refer for remand. The Order granting that motion was entered *before* the Order of "permanent transfer" for trial of a claim by Lexecon against only Milberg. A separate judgment of dismissal was entered in favor of Cotchett and appealed by Lexecon *before* the trial against Milberg. The Cotchett Respondents, having previously been dismissed as parties to the case, were not parties to the trial.

There is no issue as to transfer for "purposes of trial," or trial venue, or "permanent transfer," or "self-transfer" with respect to Cotchett. This Court's decision not to accept for review Lexecon's proposed Question 2, regarding the District Court's Rule 12(b) Order of Dismissal of Lexecon's malicious prosecution and abuse of process counts, terminates Lexecon's case against the Cotchett Respondents for all purposes.

In this Separate Brief, we address the impropriety of the scope of relief Lexecon seeks to obtain in this Court. We do not address the question whether a transferee court can transfer a "case to itself for purposes of trial," since that did not occur with respect to the Cotchett Respondents. If it did, we would join in Milberg's Brief.

STATEMENT OF THE CASE

We join in the Statement of the Case contained in the Milberg Brief. The facts set forth below are those particularly material to the Cotchett Respondents.

A. The termination of the case against Cotchett during pretrial proceedings.

On November 29, 1993, the District Court in Arizona dismissed, on Rule 12(b)(6) motion, the first two counts of Lexecon's Amended Complaint: for malicious prosecution and abuse of process in the underlying Arizona *Lincoln Savings* case. *In Re ACC/Lincoln*, 845 F.Supp. 1377 (D. Ariz. 1993). Lexecon did not challenge the transferee Court's authority to dispose of those claims.

On January 14, 1994, the Cotchett Respondents filed a motion for summary judgment on all remaining counts. CR 186.[1] The Court granted Lexecon's Rule 56(f) application and allowed it approximately 10 months of additional unrestricted discovery. CR 192, 234. On August 9, 1994, after defendants' motions for summary judgment were pending for eight months, Lexecon filed a motion to refer the case back to the JPML for remand to Illinois. CR 288.

Cotchett's motion for summary judgment was argued on April 6, 1995. CR 580. On April 24, 1995, the Court granted the motion in full, dismissing all remaining claims against Cotchett. *In Re ACC/Lincoln*, 884 F.Supp. 1388 (D. Ariz. 1995).

On May 1, 1995, Cotchett lodged a separate Rule 54(b) judgment of dismissal. CR 585. Lexecon filed objections challenging only the exercise of Rule 54(b) discretion. CR 587. There was no challenge to the transferee Court's authority to enter a final judgment in favor of Cotchett. *Id.*

On May 5, 1995, the Court ruled on all venue motions. It entered the "transfer" Order that is the subject of Lexecon's Petition. The sole effect of the Order was that the single claim surviving summary judgment – a defamation claim against Milberg arising from a letter written by one of its lawyers – was to be tried in Arizona. J.A. 20.

On June 7, 1995, a separate Rule 54(b) judgment in favor of the Cotchett Respondents was entered. CR 602;

[1] "CR" refers to the record by document docket number in the District Court.

Cotchett App. 1. On July 3, 1995, Lexecon appealed from that separate judgment. Cotchett App. 2. In its Docketing Statement (Cotchett App. 3), Lexecon stated that it was appealing the merits of both the Rule 12(b)(6) and Rule 56 orders. There was no reference whatsoever to any issue pertaining to transfer for trial, or remand, or venue. The substantive appeal from the summary judgment Order was abandoned. It was not briefed by Lexecon in the Court of Appeals.

On July 25, 1995, Lexecon tried its defamation claim against Milberg and lost. Its appeal from the judgment entered in favor of Milberg was consolidated in the Court of Appeals with Lexecon's prior appeal from the judgment in favor of Cotchett.

B. Lexecon invokes, and accepts the benefits from, the transferee Court's dispositive motion jurisdiction.

On December 13, 1994, four months *after* Lexecon now contends the transferee Court lost all authority to rule on dispositive motions, it filed its own dispositive motion in that court to dismiss Milberg's counterclaims. CR 477. The motion was not filed conditionally or "without prejudice" to Lexecon's motion for remand. *Id.* Lexecon's motion to dismiss was granted in full and affirmed on appeal. Lexecon claimed and was awarded costs and accepted approximately $10,000 in credit against Milberg's costs. CR 691. Order, 11/13/95; Amended Judgment 12/12/95.

C. The Cotchett Respondents.

The Cotchett Respondents are residents of California.[2] They do not do or solicit business in Illinois. CR 310, Ex. D. The alleged acts in Illinois that Lexecon claimed gave rise to personal jurisdiction there were not committed by any of the Cotchett Respondents. *Id.*, Exs. E, F.[3]

The Cotchett firm filed one of the early Lincoln Savings cases in California which was transferred to Arizona and consolidated with the others. The firm was appointed by the Court as one of several "co-lead" class counsel. Responsibility for prosecuting the claims against over 100 separate defendants was divided among class counsel. Prosecution of the claims against Lexecon was the Milberg firm's responsibility.

Lexecon alleged below (after six months of discovery) that "Milberg Weiss" made the decision to add Lexecon as a defendant for the alleged ulterior purpose of

---

[2] Cotchett, Illston & Pitre's name was changed in 1995 to Cotchett & Pitre after Respondent Susan Illston retired from the firm to become a United States District Court Judge for the Northern District of California.

[3] While Lexecon was preparing the filing of this case in Chicago, its lawyers concluded that Illinois did not have long-arm jurisdiction over Cotchett and that the lawyers would be faced with a "Rule 11 problem" if they asserted it. CR 310, Ex. C. Cotchett demonstrated in the District of Arizona that, if any claims against them were to be tried, it would be wasteful to remand to Illinois since that District lacked personal jurisdiction over them. Brief of Cotchett Appellees in Court of Appeals, 2/12/96, Pt. III(D). There was never any dispute or doubt that the District of Arizona had personal jurisdiction and proper venue over all parties, or that Lexecon could have originally filed its case there against all parties.

creating a "weapon" that "Milberg Weiss" could use to "extort unfair advantages" from Lexecon in other cases where Fischel was adverse to Milberg. CR 289, ¶¶ 36, 38. The Cotchett firm was not adverse to Lexecon in any other case. Mr. Fischel admitted in deposition that he had never even met Mr. Cotchett or Judge Illston until the trial in *Lincoln Savings*, and that he had never encountered them in any other case. CR 484, Ex. B, 308/1-309/3, 309/4-314/3.[4]

The original attorney engaged by Lexecon to prosecute this case testified that Lexecon never complained that any of the Cotchett Respondents was engaged in conduct which Lexecon claims caused it damage. CR 484, Ex. D. One of Lexecon's lawyers in *Lincoln Savings* testified that he did not know why the Cotchett Respondents were made part of this case. CR 484, Ex. F. He did not even know who they were. *Id.*

In Lexecon's first Brief in the Court of Appeals, it stated that its case was based upon "acts of Milberg Weiss" with no mention of Cotchett whatsoever. CR 484, Ex. G.

---

[4] One example of how Lexecon misrepresents the record concerning Cotchett and Fischel is the statements at pages three and four of its Brief, without citation to the record, that both the Cotchett and Milberg firms have "brought numerous, highly publicized class action securities lawsuits" and that Fischel, a professional defense witness, was their nemesis. The record, as cited above, shows those allegations to be false insofar as the Cotchett firm is concerned. The real antagonists here are Lexecon and Milberg. Cotchett has been caught in the cross-fire.

D. The MDL Transfer to Arizona.

Lexecon and Fischel conduct a nationwide business providing expert testimony and consulting for defendants in securities cases. The "vast majority" (Fischel's term) of its work involves cases pending *outside* of Illinois. CR 443, Ex. A at 358/15-24. One of Lexecon's Arizona clients was Charles H. Keating, Jr. The consolidated class in *Lincoln Savings* alleged that Lexecon's reports for Keating's Lincoln Savings were false, and that Lexecon thereby aided and abetted Keating/Lincoln in defrauding regulators. Lexecon litigated that case in Arizona for over two years, and proceeded to trial in Arizona. (The Arizona transferee court transferred the case to itself for trial without objection from Defendant Lexecon).

Lexecon's false allegations pertaining to its settlement of the case in the District of Arizona were of concern to the JPML in transferring the case to Arizona because the *Lincoln Savings* settlements were still under that Court's continuing jurisdiction. CR 310, Ex. B, JPML Tr. 5/21/93, pp. 9-10.

Also of concern was that Lexecon's counsel told the Panel that the District Court in Illinois said that the District of Arizona's Order of December 31, 1992 would not be binding in Illinois. CR 310, Ex. B, *supra*, pp. 12-13 (in effect, giving Lexecon an "horizontal appeal").[5]

---

[5] This Court has expressed concern about courts of one jurisdiction attempting to undermine the preclusive effect of a settlement in another jurisdiction. *See Matsushita Elec. v. Epstein*, 116 S.Ct. 873 (1996).

SUMMARY OF ARGUMENT

The transferee Court had authority to dispose of Lexecon's case against Cotchett by dispositive pretrial motion. That authority is provided by statute, JPML Rule, unanimous case law, and is also conceded in the dissenting opinion in the Court of Appeals upon which Lexecon relies.

Furthermore, Lexecon's filing of a motion to refer for remand did not divest the transferee Court of that authority. There is no law to support such a contention, or a principled or persuasive reason to create such law. That would be contrary to the 28 U.S.C. § 1407(b)'s mandatory command that "pretrial proceedings shall be conducted" by the transferee court. It would also undermine the MDL process by empowering a litigant to interrupt and terminate *pending* pretrial proceedings (*i.e.*, Cotchett's motion for summary judgment here) in the transferee court merely by filing a motion to refer for remand.

Moreover, since Lexecon abandoned its appeal from the summary judgment obtained by Cotchett, and has not demonstrated any substantive error or prejudice with respect thereto, Lexecon's attempt to reverse Cotchett's summary judgment should also be rejected by virtue of 28 U.S.C. § 2111 as academic and "harmless."

Finally, Lexecon invoked and accepted the benefits from the transferee Court's authority it now claims was nonexistent. Thus, it should be estopped from contending the District of Arizona could not rule on summary judgment motions.

ARGUMENT

A TRANSFEREE COURT'S AUTHORITY TO TERMINATE A CASE BY PRETRIAL DISPOSITIVE MOTION IS UNCONTESTED AND BEYOND CHALLENGE.

A MDL transferee court's authority to adjudicate dispositive motions is confirmed by the language of the statute, its legislative history, MDL Rule, and unanimous case law. *See* 28 U.S.C. § 1407(a) (no remand if case "previously terminated" in the transferee court); 28 U.S.C. § 1407(b) (plenary authority to conduct "pretrial proceedings"); H. Rep. No. 1130, 90th Cong. 2d Sess., 1968 U.S.C.C.A.N. at 1900 ("The transferee district court would have authority to render summary judgment."); Rule 14(a), JPML ("[a]ctions terminated in the transferee district court by valid judgment, including, but not limited to summary judgment . . . shall not be remanded . . . "); *In Re Korean Airlines*, 829 F.2d at 1172, 1178 (D.C. Cir. 1987) (concurring opinions), *aff'd* 490 U.S. 122 (1989); numerous cases cited in 15 Wright, Miller & Cooper, *Federal Practice & Procedure*: Jurisdiction 2d § 3866, n. 10 (2d Ed. 1986) and Supp. Serv., 3/97 ("transferee court has the authority to enter dispositive orders terminating cases"); Manual for Complex Litigation § 31.132 at 253 (3d Ed. 1995); Weigel, *The Judicial Panel on Multi-District Litigation, Transferor Court and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

The dissenting Judge in the Court of Appeals did not dispute the foregoing authorities:

> It is true that an MDL court can dispose of a case by settlement or motion and thus prevent the JPML from remanding it. But that is a possibility expressly accounted for in section 1407(a),

> which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously been terminated." * * * Congress may have felt that federal judges are fungible for purposes of resolving legal questions . . .

J.A. 65-66, 68.

THE CONTENTION THAT THE MERE FILING OF A MOTION TO REFER FOR REMAND DIVESTS THE TRANSFEREE COURT OF AUTHORITY TO DECIDE THEN PENDING DISPOSITIVE PRETRIAL MOTIONS HAS NO BASIS IN LAW AND WOULD UNDERMINE MDL PRACTICE.

A. Lexecon's contention.

The dissent below, after determining that the District Court abused its discretion in transferring the remaining claim against Milberg "to itself" under 28 U.S.C. § 1404(a), concluded "[w]e must therefore vacate that order and all *subsequent orders* entered by the district court including, of course, the final judgment entered after trial" (emphasis added). J.A. 79. That conclusion would not affect Cotchett since the orders dismissing all claims against them were entered *prior to* the transfer Order.

However, the dissent also states, in a footnote and without citation to authority, that "all orders" entered *after* Lexecon filed its motion to refer for remand "on August 5, 1994," "particularly the summary judgment granted on April 24, 1995, should be vacated." J.A. 79, n. 22. It is that supplemental conclusion that Lexecon urged in the Court of Appeals and what it seeks to achieve in

this Court. Brief, pp. 11, 32. It assumes, without reference to the record, that "all coordinated and/or consolidated pretrial proceedings" had terminated when it filed its motion to refer for remand on August 5, 1994. It then argues, without citation to any MDL case law authority, that the transferee Court was then and there divested of all authority to act on pending as well as future motions. *Id.* at 18.

Elsewhere in its Brief, Lexecon argues that there never were "any coordinated or consolidated pretrial proceedings." *Id.* at 7. However, it never challenged the JMPL'S transfer order as provided for in 28 U.S.C. § 1407(e), and litigated for over a year in the transferee district before moving for remand, engaging in extensive motion practice, discovery, and multiple petitions to the Ninth Circuit. Lexecon waived its right to contest the MDL transfer, participated in it for over a year, and should be judicially estopped from collaterally attacking it in this Court.

B. No basis in law or practice.

There is no basis in the MDL statute, its legislative history, case law, policy, or legal commentary, for the position that the mere filing of a motion to refer for remand divests the transferee court of authority it otherwise undisputedly has to decide pending dispositive pretrial motions. If Congress intended the mere filing of a motion to refer for remand to terminate the authority of the transferee court, it could easily have enacted such a provision.

Moreover, such a rule would undermine the MDL process. It would empower a litigant to unilaterally terminate proceedings in the transferee court merely by filing a motion for remand. Taken to its logical extent, such a motion could be filed the day after transfer to preclude the transferee court from conducting any pretrial proceedings mandated by statute and JPML orders.

C. No claim of substantive error or showing of prejudice.

Such a drastic rule is particularly inappropriate where, as here, there is no assignment of error in the summary judgment and no showing of prejudice. Lexecon abandoned its appeal of the summary judgment in favor of Cotchett by not arguing it in its Opening Brief in the Court of Appeals. *E.g., Officers of Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725 (9th Cir. 1992). It made no attempt in the Court of Appeals, or in its Brief in this Court, to demonstrate that there was a material issue of fact with respect to the claims against Cotchett dismissed on summary judgment.

Furthermore, Lexecon made no attempt in the Court of Appeals, and makes no attempt in its Brief in this Court, to demonstrate actual prejudice as the result of the District Court in Arizona (rather than the District Court in Illinois) deciding the summary judgment motion. Lexecon may have a strategic *preference* for a particular federal judge, but it has no *right* to have any particular federal judge hear and decide motions. To paraphrase the dissenting Judge below, federal judges are "fungible" for

such purposes. J.A. 68. Lexecon's appeal from the Cotchett judgment is barred by 28 U.S.C. § 2111.

Also, an adjudication free of error and prejudice in a court with jurisdiction and venue should not be vacated even if there were an erroneous refusal to transfer venue. *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996). *See also Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.")

D. Estoppel.

Finally, Lexecon should be estopped from contending that the transferee Court lost its authority to rule on dispositive pre-trial motions when it filed its motion to refer for remand. Thereafter, Lexecon invoked that very authority, without express reservation, and benefitted from it. *See, e.g., Rosen v. Rae*, 647 P.2d 640 (Ariz. App. 1982); *In Re Denney*, 135 F.2d 184, 186 (7th Cir.), *cert. denied sub nom., Denney v. Fort Recovery Banking Co.*, 320 U.S. 474 (1943); 4 *C.J.S.* Appeal & Error § 193 (1993); *see generally, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

CONCLUSION

If the Court determines that it was error for the District of Arizona to try the defamation claim against the Milberg Defendants, and such error were prejudicial and not waived, then only that claim should be retried in Illinois. In all events, the summary judgment obtained by the Cotchett Respondents during the course of pretrial proceedings should not be disturbed.

The separate judgment entered in favor of the Cotchett Defendants on pretrial motions should be affirmed.

Respectfully submitted,

GERALD MALTZ
Counsel of Record
MILLER, PITT & MCANALLY, P.C.
One South Church Ave.,
Suite 900
Tucson, AZ 85701
(520) 792-3836
Attorneys for Respondents Joseph W. Cotchett, Susan Illston, and Cotchett, Illston & Pitre

Dated: August 18, 1997

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	MDL Docket No. 834 CV 93-1087 PHX JMR
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, et al., Defendants.	**ORDER** (Filed June 7, 1995)

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants **ARE DISMISSED WITH PREJUDICE.**

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States
District Judge

APPENDIX 2

A. Bates Butler III
BUTLER & STEIN, P.C.
110 South Church Avenue, Suite 9300
Tucson, Arizona 85701
(602) 628-1618
State Bar No. 002417

Attorneys for LEXECON INC. and DANIEL R. FISCHEL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	)	MDL Docket No. 834
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, a partnership, *et al.*, Defendants.	)	No. CIV 93-1087 PHX JMR Hon. John M. Roll, *Judge Presiding*

NOTICE OF APPEAL

Notice is given that plaintiffs Lexecon Inc. and Daniel R. Fischel hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered on November 29, 1993 granting in part the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston to dismiss the Amended Complaint, the Order

entered on December 15, 1994 denying plaintiffs leave to file their proposed Second Amended Complaint, and the Order entered on April 24, 1995 granting the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston for summary judgment on plaintiffs' remaining claims, all of which are final judgments with respect to defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston as a result of the district court's entry of a Rule 54(b) certification on June 7, 1995.

Dated: July 3, 1995

Respectfully submitted,

/s/ A. Bates Butler III
One of the attorneys for
plaintiffs Lexecon Inc. and
Daniel R. Fischel

APPENDIX 3

[DOCKET SHEET EXCERPT]

On June 7, 1995 an order was entered granting the Cotchett defendants' motion for a certification of the judgment in their favor under Rule 54(b).

3. Issues Proposed To Be Raised On Appeal

Whether the district court erred in dismissing plaintiffs' abuse of process, malicious prosecution and several defamation claims under Rule 12(b)(6) and in refusing to permit plaintiffs to file a proposed Second Amended Complaint on the ground that it also failed to state a claim.

Whether the district court erred in granting summary judgment on the remaining claims for tortious interference, defamation, commercial disparagement and violation of the Illinois Consumer Fraud and Deceptive Practices Act.